

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
WENDELL L. GRIFFEN, JUDGE

DIVISION IV

CACR 06-367

February 7, 2007

MICHAEL DAVID MITCHELL,  
APPELLANT

AN APPEAL FROM CRAWFORD  
COUNTY CIRCUIT COURT  
[CR 2005-109-B]

V.

HON. GARY RAY COTTRELL, JUDGE

STATE OF ARKANSAS  
APPELLEE

AFFIRMED

Michael Mitchell appeals from his convictions for possession of methamphetamine with intent to deliver and possession of marijuana.<sup>1</sup> He argues that the State failed to prove that he possessed a usable amount of methamphetamine with the intent to deliver. His challenge to the possession of marijuana conviction is that the State failed to make a prima facie case of possession. Mitchell also argues that the trial court's admission of evidence of alleged drug buys prejudiced the jury. Finally, he asserts that he should have been granted a mistrial due to the prosecutor's statements made during closing arguments of the sentencing proceeding.

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<sup>1</sup>He was also convicted of possession of drug paraphernalia, simultaneous possession of drugs and a firearm, and failure to appear, but does not challenge those convictions on appeal.

We affirm Mitchell's convictions because his sufficiency arguments are not preserved for appellate review; affirm the admission of evidence of the drug buys because that evidence was relevant to prove intent; and affirm the sentences imposed because Mitchell failed to obtain a clear ruling on his motion for a mistrial.

The charges in this case were based on evidence seized on February 25, 2005, when officers of the Crawford County Sheriff's SWAT team and the local Drug Task Force executed a search warrant at a camper-trailer on Mitchell's property in Crawford County. The search warrant was obtained based on information given by a confidential informant who made two controlled buys; the last buy was made "a couple of hours" before the search warrant was executed.

Mitchell and three other persons, including the CI, were found in the trailer. Mitchell was found with drugs on his person, and a rifle was found in the bedroom of the trailer. Mitchell denied that the drugs were found on his person but Investigator Lannie Reese, who set up the controlled buys and searched Mitchell, testified that he found in Mitchell's pants pocket a small black container that held a blue bag containing white powder. The substance in the bag was determined by the Arkansas State Crime Laboratory to contain .5003 grams of a mixture of methamphetamine and dimethyl sulfone (a substance used as a "cutting" agent). Because the lab did not perform a quantitative analysis, no evidence was presented to compare the weight of the methamphetamine relative to the dimethyl sulfone; in other words, there was no evidence presented as to the weight of the methamphetamine alone.

Neither the crime lab chemist nor the two police officers who testified opined as to whether the amount of the substance was a usable amount.

The money from the two drug buys, identified as such by Reese, was also found on Mitchell's person. Forty dollars from the second drug buy was found in Mitchell's shirt pocket during the execution of the search warrant. An additional sixty dollars from the first controlled buy was found on Mitchell when he was later searched at the police station. Mitchell argued in a motion in limine that evidence concerning the controlled buys, including the buy money, should be excluded because it was evidence of prior bad acts for which he had not been charged. After the State explained that the most recent controlled buy was made a "couple of hours" before the execution of the search warrant, the trial court denied the motion in limine.

During the hearing, Mitchell consistently objected when the State sought to introduce evidence of the drug buys made by the CI. He argued that the evidence was introduced to prove other wrongs or prior bad acts for which he had not been charged. The trial court allowed the evidence regarding the drug buys.

At the close of the State's evidence, Mitchell moved for dismissal on the ground that the jury would be required to speculate that the methamphetamine he possessed was intended for delivery. He also argued that the State failed to make a prima facie case and that its evidence was insufficient to submit to the jury. The trial court denied the motion and Mitchell "renewed" his argument regarding the State's failure to prove that he had intent to

deliver on a different ground – failure to prove possession. He argued that he did not have possession of the drugs and that any of the other persons in trailer could have possessed the drugs. The court denied the motion, noting that the officer testified that he took the drugs from Mitchell.

A jury found Mitchell guilty as charged. During closing arguments of the sentencing proceeding, Mitchell moved for a mistrial because the prosecutor commented in his rebuttal closing argument, “Maybe Mr. Mitchell has made it 53 years before being caught because he was a good criminal at what he does.” After hearing from counsel on both sides, the trial judge told the parties, “Get over this.” The prosecutor thereafter did not elaborate on his comment and no further reference was made to the prosecutor’s comment by Mitchell or by the court.

The jury subsequently sentenced Mitchell to ten years for possession of methamphetamine with intent to deliver; this sentence was to run concurrently with his other sentences. He was fined \$500 for possession of marijuana but received no jail time for that offense.

### *I. Sufficiency of the Evidence*

Mitchell was convicted pursuant to Ark. Code Ann. § 5-64-401 (Repl. 2005), which provides that it is unlawful for any person to possess methamphetamine with the intent to deliver it. He challenges the sufficiency of the State’s evidence supporting this conviction, arguing that the State failed to prove that he possessed a usable amount of methamphetamine

with the intent to deliver because it failed to prove the amount of pure methamphetamine and failed to prove that the amount of the substance was sufficient to have a physiological effect on a user. We affirm because Mitchell's arguments are procedurally barred.

Arkansas Rule of Criminal Procedure 33.1(a) and (c) provide that a motion for directed verdict in a jury trial shall state the specific grounds therefor, and that a defendant's failure to do so constitutes a waiver of any question pertaining to the sufficiency of the evidence. *See Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990) (holding the defendant's argument that the State failed to prove a usable amount of methamphetamine was not preserved where it was not specifically raised in a directed verdict motion). *See also Saul v. State*, 33 Ark. App. 160, 803 S.W.2d 941 (1991). A party cannot change the grounds for a directed-verdict motion on appeal, but is bound by the scope and nature of the argument presented at trial. *Avery v. State*, 93 Ark. App. 112, \_\_\_ S.W.3d \_\_\_ (2005).

In his motion for a directed verdict, Mitchell did not argue that the State failed to prove that he possessed a usable amount of methamphetamine with intent to deliver or that he possessed an amount that would have a physiological effect. Instead, he argued as follows:

Your Honor, we would move to dismiss the possession with intent to deliver. I think, at most, the State has proved possession of methamphetamine. *The jury will be required to speculate as to whether or not this was for delivery or not; and I don't think that's permitted. There's no evidence that this defendant intended to deliver this methamphetamine to anyone or any person.* We would also move that the State's evidence in the case is insufficient to submit to the jury, based on the evidence, *because they have not made a prima facie case.*

(Emphasis added.) Mitchell subsequently “renewed” his motion regarding the State’s proof of intent by arguing that he did not have the drugs in his possession or know that drugs were in the trailer, and that there were three other persons in the trailer to whom the drugs could have belonged.

Thus, in Mitchell’s original motion, he challenged *only* the element of intent to deliver, arguing the jury would be required to speculate to determine whether the methamphetamine was intended for delivery. He abandoned this argument because he did not renew it at the close of all of the evidence. Instead, in his renewal, he focused on the element of *possession*: he professed he did not have the drugs on his person, had no knowledge of them, and that the drugs could have belonged to other persons.

In any event, Mitchell clearly never raised the specific arguments that the State did not prove intent to deliver because it did not prove he possessed a usable amount of drugs or did not prove that he possessed an amount sufficient to produce a physiological affect. Nor did he challenge a specific element of the State’s proof of possession of marijuana, which he also attempts to challenge on appeal by merely stating the State failed to make a *prima facie* case. Thus, pursuant to Rule 33.1 and *Moore, supra*, we affirm Mitchell’s convictions without reaching the merits of his arguments.<sup>2</sup>

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<sup>2</sup>The State was not required to prove the amount of pure methamphetamine because the measurable amount of a controlled substance for purposes of inferring intent includes the amount of the drug plus all adulterants. See Ark. Code Ann. § 5-64-401(a)(1) (Repl. 2005)(providing that the aggregate weight of methamphetamine includes an adulterant or diluent); *Piercefield v. State*, 316 Ark. 128, 981 S.W.2d 348 (1994). Furthermore, the

## *II. Evidence of Prior Bad Acts*

Mitchell's second argument is that the repeated references during trial to the two controlled buys constituted inadmissible evidence of prior bad acts, which is prohibited by Arkansas Rule of Evidence 404(b). Mitchell generally identifies the objectionable testimony as the testimony calling him a bad guy, identifying the money found on his person as buy money, and the testimony indicating that the CI was instructed to buy "substance." He asserts that the testimony was admitted so that the State could introduce evidence of the controlled buys without presenting the CI for cross-examination and to create the impression in the mind of the jury that he was "dealing drugs" even though he had no prior charges against him. It is clear from Mitchell's abstract that he consistently objected to the testimony regarding the previous controlled buy as prior bad acts. We address his argument on the merits and affirm the admission of the evidence of prior drug buys.<sup>3</sup>

The admission of evidence under Rule 404(b) is left to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *See Jarrett v. State*, 310 Ark. 358, 833 S.W.2d 779 (1992). There was no abuse of discretion

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Arkansas Supreme Court has rejected the argument that in order for an amount of a controlled substance to be a usable amount under the Controlled Substances Act, it must be of a sufficient amount to produce a chemically-induced behavioral, hallucinogenic, or otherwise altered state. *See Jones v. State*, 357 Ark. 545, 554, 182 S.W.3d 485, 490, fn.2 (2004).

<sup>3</sup>Mitchell concedes that he did not preserve any argument regarding the denial of his Sixth Amendment right to cross-examine the witnesses against him; accordingly, we do not address that issue.

in the instant case, manifest or otherwise. Mitchell is correct in arguing that Rule 404(b) prohibits evidence of other crimes, wrongs, or acts if admitted to show that the defendant acted in conformity therewith. However, he ignores that part of 404(b) that allows such evidence as proof of – among other things – motive, opportunity, intent, preparation, plan, or knowledge. In this case, the testimony regarding the controlled buys was admissible to establish Mitchell’s intent to deliver a controlled substance.

Two controlled buys occurred before the search warrant in this case was executed. The record does not indicate when the first controlled buy took place, but \$60 in buy money, from the first controlled buy, was found on Mitchell’s person when he was searched at the police station. The \$40 found in Mitchell’s shirt pocket was identified as the money from the second controlled buy, which was the basis on which the search warrant was issued, and which took place “a couple of hours” before the search warrant was executed.

Mitchell maintained that the CI gave him \$40 the day the search warrant was executed and gave him \$20 or \$30 a few days before then to repay a \$150 loan. This explanation does not account for the full amount of buy money that was found on him and contradicts Officer Reese’s assertion that the money was given as part of a controlled drug buy. On these facts, the testimony regarding the controlled buys was relevant to prove intent. *See Setters v. State*, 4 Ark. App. 46, 627 S.W.2d 263 (1982) (affirming the admission of testimony by the undercover officer in a prosecution for the sale of LSD that the defendant sold LSD to him and on two other occasions sold marijuana to him, where all of



the transactions took place within a twenty-two hour period). Therefore, we hold that the trial court did not err in admitting testimony regarding the controlled buys.

### *III. Mistrial Motion During Sentencing*

Mitchell's last argument is that the trial court erred in denying his motion for a mistrial made during the sentencing proceeding. Mitchell made the motion during the State's rebuttal closing, as follows:

STATE: Maybe Mr. Mitchell has made it fifty-three years before being caught because he was a good criminal at what he does.

DEFENSE: I object –

STATE: We don't know.

DEFENSE: – to that, Your Honor. I think that is repugnant.

[Counsel are instructed to approach.]

STATE: Maybe he's made it fifty-three years without a felony conviction because of what he does as being a good criminal. That's argument.

DEFENSE: I thinks that's the basis for a mistrial of this portion of the trial, Your Honor.

STATE: He said he had never been convicted of a felony. I can make the argument.

COURT: This is closing argument.

DEFENSE: Your Honor, that is beyond the bounds of permissible. He has to argue for the evidence in the case and there's no evidence that he's committed criminal acts in the past.

STATE: For one thing, there was evidence that he had a marijuana conviction, that he –

COURT:       Get over this.

The prosecutor continued his closing but did not make further similar references; Mitchell made no further motions.

Mitchell argues that the trial court should have granted his motion for a mistrial because the prosecutor's comments portrayed him as "a scofflaw who had managed to get through life uncaught" and persuaded the jury to sentence him in an attempt to "right past mistakes" rather than to punish him for his current convictions. Alternatively, because a trial court is authorized to impose sentencing where the jury fails to agree on a punishment, *see* Ark. Code Ann. § 5-4-103 (Repl. 2006), Mitchell argues the trial court should have "stepped in and determined a proper sentence after the jury was tainted by the improper comments."

It is well-settled that a mistrial is an extreme remedy that should be granted only when the error is beyond repair and cannot be corrected by curative relief. *Brown v. State*, 74 Ark. App. 281, 47 S.W.3d 314 (2001). A trial court has wide discretion in granting or denying a motion for a mistrial, and the appellate court will not disturb the court's decision absent an abuse of discretion or manifest prejudice to the movant. *Id.*

We affirm Mitchell's sentences. His argument regarding a mistrial is not preserved for appellate review because he failed to secure a clear ruling on his motion. The trial court's final statement was simply, "Get over this," which can, at best, be characterized as an admonition to counsel to proceed. *See Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993) (holding there was no ruling on an objection during the sentencing phase when the

trial court stated it believed the jury knew what to consider and told counsel to proceed). Moreover, Mitchell would not be entitled to the relief he requests on appeal because, despite the absence of a clear ruling on his request, he thereafter failed to request that the jury be admonished to disregard the prosecutor's comment. *Id.*<sup>4</sup>

Affirmed.

PITTMAN, C.J., and VAUGHT, J., agree.

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<sup>4</sup>A prosecutor's statements made during closing arguments must be within the scope of reasonable inferences based on the evidence presented at trial. *See Butler v. State*, 264 Ark. 243, 570 S.W.2d 272 (1978). We do not agree that the mere fact that Mitchell admitted he had a prior misdemeanor conviction raises a reasonable inference that he has thus far avoided a felony conviction because he is a "good criminal." Nonetheless, Mitchell failed to demonstrate that he was prejudiced by the prosecutor's comments. Of Mitchell's five convictions, he received the maximum sentence for only one: failure to appear. Although prejudice may be demonstrated where a defendant receives the maximum sentence prescribed by law, *see Buckley v. State*, 341 Ark. 864, 20 S.W.3d 331 (2000), Mitchell fails to explain how the prosecutor's comments influenced the jury to impose the maximum sentence on the charge of failure to appear, which is unrelated to the evidence concerning the other charges in this case.